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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BYRON CARLOS WINN,

Defendant and Appellant.

E069635

(Super.Ct.No. RIF1605712)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed in part and remanded for resentencing in part.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew S. Mestman, and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Byron Carlos Winn broke into a home and assaulted a resident inside. Following a jury trial, defendant was convicted of first degree residential burglary (Pen. Code, § 459; count 1)¹ with another person present other than an accomplice (§ 667.5, subd. (c)(21)), and misdemeanor simple assault (§ 240), the lesser included offense of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) as alleged in count 2. In a bifurcated proceeding, defendant admitted that he had suffered one prior serious felony conviction (§ 667, subd. (a)) and one prior strike conviction for a 1996 robbery (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)). After the trial court denied defendant's motion to strike his prior 1996 robbery conviction, defendant was sentenced to a total term of 13 years in state prison with 250 days of credit for time served as follows: the middle term of four years on count 1, doubled to eight years due to the prior strike conviction, plus an additional five years for the prior serious felony conviction, and a concurrent term of 180 days in county jail for the misdemeanor simple assault conviction.

On appeal, defendant argues (1) there was insufficient evidence to support the jury's verdict for the first degree residential burglary conviction, and (2) the trial court abused its discretion in denying his motion to strike his prior strike conviction. In a supplemental brief, defendant also asserts that Senate Bill No. 1393 (hereafter Senate

¹ All future statutory references are to the Penal Code unless otherwise stated.

Bill 1393) applies retroactively and that his case must be remanded to the trial court to exercise its discretion whether to strike his five-year prior serious felony enhancement. As we explain, we agree that the matter should be remanded for resentencing under Senate Bill 1393. Accordingly, we vacate the sentence and remand for resentencing, but affirm the judgment of conviction in all other respects.

II

FACTUAL BACKGROUND

Nedal Salaman lived in a detached house behind an animal feed store in Perris, California, with Eddie Howard, an ex-employee of the store. A couple of days prior to October 19, 2016, “AD” or Adonis Burton came to the house, looking for his girlfriend Brittany “like a madman.” Burton entered the house, picked Brittany up by the hair, punched her in the head and stomach, and dragged her outside. Salaman, who was standing outside at the time, told Burton not to do that there and to “[t]ake it off the property.” Burton apologized, said it would not happen again, and left. Immediately afterward, Salaman asked Howard how he could let that happen.

Two days later, on October 19, 2016, Salaman was home with his nine-year-old son, who was there on a visit. Howard was not home, but Lisa Terrazas, Howard’s “cousin slash girlfriend” was there. The front door was locked with a “makeshift lock.” At approximately 5:30 p.m., Burton returned and, after pushing open the front door, entered the house. Salaman told Burton to leave, and said ““Nobody is here for you. I’m here with my son. You need to leave.”” Burton said he was ““looking for that ho,”” i.e.,

Brittany. Burton walked past Salaman, and opened Howard's bedroom door. Salaman said nobody was there for him and again told him to leave. Burton then went to Salaman's son's room and poked his head inside the room. At that point, Salaman felt that he needed to defend himself and his son, so he hit Burton.

Salaman noticed that defendant and another man, later identified as Robert Nolan, were in the house. Burton hit Salaman back in the face with a metal shelf, drawing blood from his nose and his face. Salaman did not believe that defendant hit him, but might have told the responding officer that all three of them hit him. Salaman grabbed a machete and he and his dog chased the three men from the house. The feed store owner called the police.

Riverside County Sheriff's Deputy David Thomas arrived at the feed store at about 5:45 p.m. and contacted Salaman. Salaman reported that defendant had been in the house, but Burton hit him, after which the other two men began hitting him. Salaman said he did not know who hit him with the metal shelf. Specifically, Salaman informed Deputy Thomas that defendant "was inside the house" and that "after [Burton] hit him, then all three of the [men] jumped in and started hitting him."

Lisa Terrazas, who testified on behalf of the defense, stated that she did not live in the house, but the feed store's owner allowed her to shower there. On October 19, 2016, she was in the house's bathroom, brushing her hair after a shower, when she heard the voice of Robert Nolan, whom she was dating at the time. She heard him asking if he could speak with her. Terrazas walked out of the bathroom to speak with Nolan. Before

she reached him, Burton charged through the hallway, “using bad language,” and asking for his girlfriend. Salaman got up off his chair in the living room and went after Burton. The two men then began fighting. Terrazas was going to try to break it up, but Nolan held her back. Defendant also was there. Terrazas saw him starting to walk out of the house. She claimed that she did not see defendant hit Salaman or aid in the fight in any way.

A surveillance video camera captured Burton, Nolan, and defendant hopping a fence from an adjacent lot to reach the front door, instead of walking down the driveway. The video captured them forcing their way through the front door, all entering the home at the same time. In addition, the video showed Salaman and his dog chasing the three men from the house, followed by Salaman’s nine-year-old son.

III

DISCUSSION

A. *Sufficiency of Evidence*

Defendant argues there was insufficient evidence to support his conviction for first degree burglary because the People failed to present sufficient evidence he formed a felonious intent before entering the residence.

When a defendant challenges the sufficiency of the evidence, appellate courts must review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Jones* (1990) 51 Cal.3d 294, 314 (*Jones*).)

“Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]” (*Jones, supra*, 51 Cal.3d at p. 314.) Alternatively stated, “[i]f the circumstances reasonably justify the jury’s findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139 (*Ceja*).)

“The same standard applies to the review of circumstantial evidence. [Citation.]” (*Ceja, supra*, 4 Cal.4th at pp. 1138-1139.) Therefore, “[w]hether the evidence presented at trial is direct or circumstantial, . . . the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Towler* (1982) 31 Cal.3d 105, 118-119; accord, *People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient for a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) An appellate court must accept logical inferences that the jury might have drawn from circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Before setting aside the judgment of the trier of fact for insufficiency of the evidence, it must clearly appear that there was no hypothesis whatever upon which there was substantial evidence to support the verdict. (*People v. Conners* (2008) 168 Cal.App.4th 443, 453; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 (*Sanghera*).)

In general, the offense of burglary requires unlawful entry of a building or other specified structure with the specific intent to commit grand or petit larceny or any felony. (§ 459; *People v. Wallace* (2008) 44 Cal.4th 1032, 1077; *In re Matthew A.* (2008) 165 Cal.App.4th 537, 540 (*Matthew A.*).) Entry of an inhabited dwelling house with the requisite intent is burglary of the first degree. (§ 460, subd. (a); *People v. Mejia* (2012) 211 Cal.App.4th 586, 605.) A defendant “may be liable for burglary upon entry with the requisite intent to commit a felony or a theft (whether felony or misdemeanor), regardless of . . . whether any felony or theft actually is committed. [Citations.]” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042; see *People v. Walters* (1967) 249 Cal.App.2d 547, 550 [the crime of burglary is completed when entry with the essential intent is made, “regardless whether the felony planned is committed or not”].)

The existence of the requisite intent, however, is rarely shown by direct proof but may be inferred from the facts and circumstances related to the offense. (*People v. Holt* (1997) 15 Cal.4th 619, 669; *Matthew A.*, *supra*, 165 Cal.App.4th at p. 541.) “[I]ntent, as a mental fact, must usually be proved by circumstantial evidence. ‘[S]uch intent must usually be inferred from all the facts and circumstances disclosed by the evidence, rarely being directly provable.’ [Citation.] In [*People v.*] *Matson* [(1974) 13 Cal.3d 35], the court held that evidence that the defendant entered a female victim’s apartment surreptitiously, hid in her bathroom with the lights out, and then denied under oath that he had done so was sufficient to support a finding of entry with intent to rape.” (*People v. Smith* (1978) 78 Cal.App.3d 698, 704 (*Smith*).) In *Smith*, the evidence that the defendant “was armed with a knife or other object of substance” when he confronted the victim in her apartment and subsequently fled was sufficient evidence to support the defendant’s burglary conviction. (*Ibid.*) The court stated that “[w]hen the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal.” (*Ibid.*)

The jury need not be unanimous as to what offense the defendant was intending to commit when he or she entered the premises. The jury must only agree the defendant intended to commit a theft or a felony at the time of entry. (*People v. Taylor* (2010) 48 Cal.4th 574, 627-628.) Where the facts and circumstances of a case and the conduct of the defendant reasonably indicate his or her purpose in entering the premises is to commit

a theft or any felony, the conviction may not be disturbed on appeal. (*Sanghera, supra*, 139 Cal.App.4th at p. 1574.)

Here, sufficient evidence supported defendant's first degree burglary conviction. There was evidence presented at trial that showed defendant, Burton, and Nolan surreptitiously approached Salaman's front door, hopping a fence from an adjacent lot, instead of walking down the driveway. Surveillance video also captured defendant, Burton, and Nolan forcing their way through the front door and entering the home together. A reasonable inference could be made that defendant, Burton, and Nolan had a felonious intent when they entered Salaman's home, namely, to harm Salaman, the man who had interfered with Burton's prior assault on his girlfriend two days earlier. (See *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75 [shared intent to commit felonious assault established where evidence showed vengeful husband entered home "accompanied on his expedition by five friends"].) In addition, three men brutally assaulted Salaman. The jury could infer from this an intent to commit an assault at the time of entry. Salaman reported to the responding officer that one of the intruders hit him with a metal shelf and that "all three of the suspects jumped in and started hitting him." Moreover, the surveillance video captured Salaman and his dog chasing defendant, Burton, and Nolan from Salaman's house. Cases have also "held that 'an intent to commit theft at the time of entry may be inferred from flight from the premises.' [Citations.]" (*Smith, supra*, 78 Cal.App.3d at p. 704.) All of this behavior was

suspicious and would support a reasonable inference that defendant entered Salaman's home with a felonious intent.

When reviewing the sufficiency of the evidence, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegations true beyond a reasonable doubt. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Although defendant argues there are ways to interpret the facts in a manner contrary to the jury's verdict, it is not our task on appeal to reweigh the evidence or to reevaluate witness credibility. (*Ibid.*) Hence, even if we were to agree that, given the absence of any additional circumstances, a trier of fact may have just as reasonably concluded that defendant entered the home without the requisite intent, reversal is not warranted. (See, e.g., *People v. Lewis* (2001) 25 Cal.4th 610, 643-644.) As we have stated, a reviewing court's opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) The jury in this case adopted an interpretation of events contrary to defendant's, and our role on appeal is simply to determine whether its findings in support of the burglary conviction are supported by sufficient evidence. The record here contains substantial circumstantial evidence supporting the jury's finding as to defendant's felonious intent.

B. *Motion to Strike Priors*

Defendant argues the trial court abused its discretion in denying his motion to strike his prior strike conviction pursuant to section 1385 and *People v. Superior Court*

(*Romero*) (1996) 13 Cal.4th 497 (*Romero*). Specifically, he asserts the court should have dismissed his prior strike conviction because he did not harbor a felonious intent in this case, he committed most of his crimes and parole violations in 2009 or before, and he was less prone to commit crimes at his current age of 45. We disagree.

1. Additional Background

Prior to sentencing, defendant filed a motion to dismiss his strike conviction for a 1996 robbery due to its remoteness in time and because his culpability in the present case was “minimal at best.” During a hearing on the motion, the trial court acknowledged its review of the probation officer’s report, the motion to strike the prior conviction, and the People’s sentencing brief. The court thereafter discussed defendant’s criminal record contained in the probation report, citing defendant’s convictions for robbery in 1996, assault with a deadly weapon in 2001, failure to appear in 2001, possession of paraphernalia in 2002, possession of a controlled substance in 2003, possession of a controlled substance in 2005, being under the influence of a controlled substance in 2009, and possession of paraphernalia in 2009, as well as 12 parole violations, two pending cases, and convictions for both burglary and assault in the present case. The court stated that it had “stricken many strikes because of their age,” but it would not do so in defendant’s case due to his recidivism. The court added, “I love striking strikes when I’m able to, but one of the considerations is protection of the public. Public safety. And I believe that [defendant] is a danger to society when he’s out because he can’t lead a law abiding life.”

Although both defendant and defense counsel pointed out that defendant had not “been in trouble in eight years,” the court noted that defendant had not “led a crime-free life or even a relatively crime-free life.” From robbery, to assault with a deadly weapon, to burglary and assault, the court noted this was “an escalation in [defendant’s] behavior,” culminating in a burglary and an attack by three men against one. Given defendant’s lengthy criminal history, its escalation in severity, and the seriousness of his present offenses, the court found that defendant “fits exactly in the sentencing scheme” and denied his motion to strike his prior 1996 robbery conviction.

2. Analysis

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss prior strike conviction allegations under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) In *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), the court identified a number of specific factors a trial court should consider when exercising its discretion. “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as

though he had not previously been convicted of one or more serious and/or violent felonies.” (*Id.* at p. 161.)

“[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) “Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Id.* at p. 378.)

The circumstances here were far from extraordinary, and the trial court properly applied the *Williams* factors to this case in denying defendant’s *Romero* motion. The court reviewed defendant’s background and criminal history in detail, as previously explained. Defendant’s criminal history dates back to 1996, when he committed a robbery and was sentenced to two years in state prison. After his release on parole, defendant violated his parole four times and was sent back to prison each time. Defendant was eventually discharged from parole in January 2001. Approximately 11 months later, in December 2001, defendant was convicted of assault with a deadly weapon and failure to appear and placed on formal probation for a period of 36 months.

Thereafter, defendant suffered drug-related convictions in 2002, 2003, 2005, and 2009, as well as, his current convictions for first degree burglary and assault. Following his 2003 drug possession conviction, defendant was sentenced to two years eight months in state prison. He was again sentenced to two years eight months in prison following his 2005 drug possession conviction. In addition, between 2003 and 2009, defendant had violated his parole 12 times, and had two pending cases against him.

Defendant's criminal history includes three state prison terms, jail terms, formal probation, and the imposition of fines and fees, all of which apparently did nothing to deter him from committing further crimes. Although defendant had not "been in trouble in eight years," it is clear from the record that prior rehabilitative efforts have been unsuccessful and that defendant had not led a crime-free life. Further, as the court noted, defendant's criminal conduct escalated in severity, culminating in a burglary and an attack by three men against one, while the victim's nine-year-old son was present. Moreover, we agree with the court that there was nothing in defendant's history to suggest he was on the right path or had favorable prospects for the future.

In light of the court's explanation of its reasons for declining to strike defendant's prior strike conviction, we do not find the decision to be arbitrary or irrational. The record clearly shows that the court was aware of its discretion and the applicable factors a court must consider in dismissing a prior strike, and that it appropriately applied the factors. Thus, we cannot say that the court abused its discretion when it declined to dismiss defendant's prior strike conviction.

C. *Senate Bill 1393*

While defendant's appeal was pending in this court, he filed a supplemental brief, which this court granted. The People in response also filed a supplemental brief. Defendant claims Senate Bill 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction was not final when Senate Bill 1393 took effect on January 1, 2019. He therefore asserts the matter should be remanded for resentencing pursuant to Senate Bill 1393 (2017-2018 Reg. Sess.), which amends sections 667, subdivision (a)(1), and 1385, subdivision (b), effective January 1, 2019, to give courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes.

The People assert that defendant's claim is "not ripe because the statutory amendment authorizing such action does not become effective until January 1, 2019." However, the People concede that defendant's judgment was not final before Senate Bill 1393's January 1, 2019 effective date, and that because the new law went into effect before defendant's judgment was final, then it would apply to defendant. Therefore, the People agree that under Senate Bill 1393, remand would be appropriate in this case.

Here, defendant admitted that he had suffered a prior serious felony conviction. Accordingly, the trial court imposed a consecutive five-year term under section 667, subdivision (a)(1), as it was statutorily required to do at the time of defendant's sentencing. (Former § 667, subd. (a)(1) ["any person convicted of a serious felony who

previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively”]; former § 1385, subd. (b) [“This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667”].) “On September 30, 2018, the Governor signed Senate Bill 1393 which, effective January 1, 2019, amends sections 667[, subdivision](a) and 1385[, subdivision](b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

In *Garcia, supra*, 28 Cal.App.5th 961, this court agreed with the position taken by both defendant and the People and held that, because nothing in Senate Bill 1393 suggests any legislative intent that the amendments apply prospectively only, “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019.” (*Id.* at p. 973; see *People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted [under *In re Estrada* (1965) 63 Cal.2d 740, 742-748 “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence

to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date"].)

We further agree with defendant and the People that remand is appropriate in this case. ““Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’ [Citations.]” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [Remand is not required if “the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement.”] (*McDaniels*).)

The record before us does not clearly indicate that the trial court would have declined to strike defendant’s prior serious felony conviction for sentencing purposes if it had the discretion to do so. (*McDaniels, supra*, 22 Cal.App.5th at p. 425 [remand an idle act if record shows that the trial court would not have exercised its discretion even if it believed it could do so]; Cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for resentencing because “the trial court indicated that it would not,

in any event, have exercised its discretion to lessen the sentence . . . by imposing two additional discretionary one-year enhancements” and describing the defendant as ““the kind of individual the law was intended to keep off the street as long as possible””].) Accordingly, remand is appropriate in this case to allow the trial court to exercise its discretion as to whether to strike defendant’s prior serious felony conviction for sentencing purposes.

IV

DISPOSITION

The matter is remanded to the trial court with directions to consider whether to exercise its discretion to strike or dismiss defendant’s five-year prior serious felony enhancement, and, if appropriate following exercise of that discretion, to resentence defendant accordingly and provide a corrected abstract of judgment to the appropriate agencies. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

MILLER

Acting P. J.

SLOUGH

J.